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No. 85-2138

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

TOWNSHIP OF WOODBRIDGE, PETITIONER

v.

TOWNSHIP OF FRANKLIN SEWERAGE AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On December 18, 1984, the United States District Court for the District of New Jersey entered an injunction against petitioner under the Clean Water Act (Pet. App. 23a-27a). Petitioner did not appeal from the entry of that injunction (see *id.* at 6a). Instead, five months later petitioner requested the district court to dissolve the injunction (*ibid.*). The district court refused (*id.* at 28a-29a), and petitioner then appealed pursuant to 28 U.S.C. 1292(a)(1), which permits appeals from interlocutory orders "granting * * * or refusing to dissolve or modify injunctions." The court of appeals affirmed, confining its review to whether the district court's refusal to dissolve the injunction was an abuse of discretion (Pet. App. 1a-15a).

2. Both courts below found that there were no changed circumstances, not already present when the injunction was originally entered, that warranted relief (Pet. App. 8a-9a,

31a). Both courts also found that petitioner's asserted reasons for relief were the same arguments the district court had "explicitly rejected" when the injunction was first entered (Pet. App. 6a-7a, 31a). In the district court's view, petitioner's belated repetition of these same arguments "border[ed] on the abusive" (*id.* at 31a). The court of appeals explained (*id.* at 9a):

> [Petitioner] could have presented these arguments to us on an appeal from the district court's entry of the * * * injunction. [Petitioner], however, neglected to take an appeal from that order. [*] Now that the time for appeal has run, [petitioner] may not avoid the consequences of its failure to appeal timely by cloaking its late appeal in the guise of a motion to dissolve the injunction. Absent the assertion of changed circumstances, the appellant is not entitled to the vacation of an unappealed injunction. Because [petitioner] did not assert any changed circumstances, the district court did not abuse its discretion in denying its motion to dissolve the * * * injunction.

The court correctly based this holding on the prevailing law that, absent changed circumstances, appellate review of an order denying a motion to dissolve an injunction "is confined to the propriety of the denial of the motion; it does not extend to the propriety of the entry of the underlying injunction" (Pet. App. 8a). See, *e.g.*, *Merrell-National Laboratories, Inc.* v. *Zenith Laboratories, Inc.*, 579 F.2d 786, 791 (3d Cir. 1978); *Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 972 n.18 (3d Cir. 1980); *Winterland Concessions Co.* v. *Trela*, 735 F.2d 257, 260 (7th Cir. 1984); *Donaldson* v. *Pillsbury Co.*, 529 F.2d 979, 981 (8th Cir.

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*Petitioner did, however, twice attempt unsuccessfully to appeal from other interlocutory orders of the district court. See Pet. App. 6a.

1976), cert. denied, 434 U.S. 856 (1977); *Sierra On-line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n. 4 (9th Cir. 1984). On that basis, the court of appeals affirmed. In dicta, the court then stated (Pet. App. 9a) that even if it could review the correctness of the original injunction, it "nonetheless would affirm the district court." Finding that the appeal was "frivolous," the court of appeals on its own motion assessed double costs against petitioner (*id.* at 15a, 34a-35a).

3. In the circumstances of this case, there is no occasion for this Court to consider the substantive issue petitioner seeks to raise (whether a municipality's obligation to meet the requirements of the Clean Water Act is dependent upon receipt of federal financial assistance). The Third Circuit's discussion on this point is dictum. Moreover, the decision below is consistent with the decisions of the two other courts of appeals that have addressed the issue. *United States* v. *City of Detroit*, 720 F.2d 443, 451 (6th Cir. 1983); *State Water Control Board* v. *Train*, 559 F.2d 921, 924-927 (4th Cir. 1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986